(2)

No. 09-188

Supreme Court, U.S.
FILED
SEP 2 0 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOSEPH V. FISHER,

Petitioner,

v.

THE PENN TRAFFIC COMPANY, BYRON E. ALLUMBAUGH, RICHARD P. BRENNAN, KEVIN P. COLLINS, JAMES A. DEMME, MATTHEW GLASS, ROBERT HOCKETT, RICHARD D. HOLIHAN, JR., PETER L. ZURKOW, JOHN DOES NOS. 1-5, BERNADETTE RANDALL-BARBER AND JANE ROES NOS. 1-5,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

WILLIAM H. O'BRIEN
Counsel of Record
COOLEY GODWARD KRONISH LLP
1114 Avenue of the Americas
New York, New York 10036
(212) 479-6000

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether ERISA § 409 authorizes a personal recovery for individual injuries.

2. Whether this Court should overrule its decisions in *Massachusetts Mutual Life v. Russell*, 473 U.S. 134 (1985) and *LaRue v. DeWolff, Boberg & Assoc., Inc.*, 128 S.Ct. 1020 (2008), which held that ERISA § 409 only authorizes recovery for injuries to an ERISA plan, and does not authorize a personal recovery for individual injuries.

3. Whether money damages are "equitable relief" under ERISA § 502(a)(3).

4. Whether this Court should overrule its decisions in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993) and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), which held that money damages are not "equitable relief" under ERISA § 502(a)(3).

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the captions.

Pursuant to Supreme Court Rule 29.6, Defendant-Respondent The Penn Traffic Company ("Penn Traffic"), by and through its attorneys Cooley Godward Kronish LLP, certifies that Penn Traffic does not have a parent corporation nor does any publicly traded corporation own 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
STATEMENT OF THE CASE	1
I. The Allegations	1
II. Disposition by the Lower Courts	4
REASONS FOR DENYING THE WRIT	6
I. The Court Should Not Revisit Whether ERISA § 502(a)(2) Provides Recovery for Individual Injuries, Which Was Settled in *Russell* and Recently Reaffirmed in *LaRue*	6
A. *Russell* Precludes Recovery under § 409 for Individual Injuries	6
B. *Russell* Remains Good Law and Was Recently Reaffirmed in *LaRue*	9
C. *Russell* and *LaRue* Were Correctly Decided; Overturning Them Would Undermine the Vital Role of *Stare Decisis*	14
II. The Court Should Not Disturb the Well-Settled Rule that "Equitable Relief" Under ERISA § 502(a)(3) Does Not Include Compensatory Damages	18
A. *Mertens* and *Great-West* Preclude Recovery Under § 502(a)(3) for Compensatory Damages	18

TABLE OF CONTENTS – Continued

Page

B. Overruling *Mertens*, *Great-West*, and Related Lower Court Decisions Would Equally Offend *Stare Decisis* Principles 22

III. The Peculiar Facts of This Case Would Provide a Poor Vehicle for the Court's Review 25

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. Jefferson Smurfit Corp., 30 F.3d 11 (1st Cir. 1994) 22

Barry v. Trustees of the Int'l Assoc. of Full-Time Salaried Officers and Employees of Outside Local Unions and District Counsel's (Iron Workers) Pension Plan, 404 F. Supp.2d 145 (D.C. 2005) 11

Brosted v. Unum Life Ins. Co. of Am., 421 F.3d 459 (7th Cir. 2005) 24

Calhoon v. Trans World Airlines, Inc., 400 F.3d 593 (8th Cir. 2005) 24

Callery v. U.S. Life Ins. Co. in the City of New York, 392 F.3d 401 (10th Cir. 2004) 24

Coan v. Kaufman, 457 F.3d 250 (2d Cir. 2006) 4, 8, 11, 22

Crosby v. Bowater Inc. Retirement Plan for Salaried Employees of Great Northern Paper Inc., 382 F.3d 587 (6th Cir. 2004) 23

D'Amico v. CBS Corp., 297 F.3d 287 (3d Cir. 2002) 23

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) ..... *passim*

Farr v. U.S. West Communications, 151 F.3d 908 (9th Cir. 1998) 24

Halbach v. Great-West Life & Annuity Ins. Co., 561 F.3d 872 (8th Cir. 2009) 24

TABLE OF AUTHORITIES – Continued

Page

Helfrich v. PNC Bank, Kentucky, Inc., 267 F.3d 477 (6th Cir. 2001) 24

In re Braniff Airways, Inc., 27 B.R. 222 (N.D. Tex. 1982) 2, 27

Kazazian v. Bartlett & Barlett LLP, No. 03 Civ. 7699 (LAP), 2006 WL 2563517 (Sept. 6, 2006) 11

LaRue v. DeWolff, Boberg & Assoc., Inc., 450 F.3d 570, *rev'd on other grounds*, 128 S.Ct. 1020 (2008) 23

LaRue v. DeWolff, Boberg & Assoc., Inc., 128 S.Ct. 1020 (2008) ..... *passim*

Lee v. Burkhart, 991 F.2d 1004 (2d Cir. 1993) 4, 8

Massachusetts Mutual Life v. Russell, 473 U.S. 134 (1985) ..... *passim*

McDonald v. Provident Indemnity Life Ins. Co., 60 F.3d 234 (5th Cir. 1995) 9, 11

McLeod v. Oregon Lithoprint Inc., 102 F.3d 376 (9th Cir. 1996) 24

Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) ..... *passim*

Panecassio v. Unisource Worldwide, Inc., No. 3:01cv2065 (CFD), 2006 WL 2128647 (July 26, 2006) 11

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 17

Pilot Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 15, 16

Rego v. Westvaco Corp., 319 F.3d 140 (4th Cir. 2003) 23

TABLE OF AUTHORITIES – Continued

Page

STATUTES

29 U.S.C. § 1104(a)(1) 3

29 U.S.C. § 1106(b)(1) and (2) 3

29 U.S.C. § 1132(a)(2) ..... *passim*

29 U.S.C. § 1132(a)(3) ..... *passim*

29 U.S.C. § 1341(c)(3)(D)(i)(I) and (ii)(II) 2, 27

29 U.S.C. § 1345 27

REGULATIONS

29 C.F.R. § 4022.7(a) 7

29 C.F.R. § 4041.42 2

29 C.F.R. § 4044.4 ..... 2, 27

STATEMENT OF THE CASE

I. The Allegations

This case involves the interpretation of two of ERISA's civil enforcement provisions, § 502(a)(2), 29 U.S.C. § 1132(a)(2) and § 502(a)(3), 29 U.S.C. § 1132(a)(3). Plaintiff-Petitioner Joseph Fisher ("plaintiff" or "Fisher") filed a complaint against Defendants-Respondents ("defendants") on August 2, 2006. (Appendix ("A.") 20a). Fisher was a participant in and beneficiary of defendant The Penn Traffic Company's Cash Balance Pension Plan. The complaint is based upon defendants' denial of plaintiff's application for a lump sum benefit, at a time when defendants were advised that the plan was underfunded and that a distress termination of the plan might be necessary.

In the complaint, plaintiff alleged that defendant The Penn Traffic Company ("Penn Traffic") was the Sponsor, Administrator, and Named Fiduciary, as defined by ERISA, of The Penn Traffic Company Cash Balance Pension Plan (the "Plan") (A. 21a-22a, ¶¶ 1, 6); that defendants Byron E. Allumbaugh, Richard P. Brennan, Kevin P. Collins, James A. Demme, Matthew Glass, Robert Hockett, Richard D. Holihan and Peter L. Zurkow were members of the Board of Directors of Penn Traffic (the "Board"), who acted as fiduciaries with respect to plaintiff's application for benefits (A. 22a, ¶ 7), and that defendant Bernadette Randall-Barber was a member of the Administrative Committee of the Plan (A. 22a, ¶ 8).

Plaintiff filed an application on August 15, 2003, requesting pension benefits in the form of a lump sum distribution. (A. 23a, ¶ 10).

At the time Fisher applied for a lump sum distribution, the Plan was underfunded, and Penn Traffic had been advised that it might have to terminate the Plan in a distress termination under which the Pension Benefit Guaranty Corporation ("PBGC") would assume its assets and liabilities. (A. 24a, ¶ 20).[1]

On September 29, 2003, the Board passed a resolution to terminate the Plan.[2] (A. 25a, ¶ 22). On October 17, 2003, Fisher's application for a lump sum was denied, and he was offered a monthly annuity instead, which he declined. (A. 23a, ¶ 11). The complaint alleged that the decision to deny plaintiff's application was made by the Board. (A. 23a, ¶ 13). The complaint further alleged that because the PBGC

---

[1] Penn Traffic was then already in bankruptcy, having filed for protection on May 30, 2003. *In Re Penn Traffic*, No. 03-22945 (ASH) (docket entry # 1) (Bankr. S.D.N.Y.). At the time, the Plan was 60 percent underfunded, or by $126 million. *See* www.pbgc.gov/media/news-archive/news-releases/2005/pr05-25.html.

[2] The prohibition on lump sum payments is triggered as soon as it is anticipated that, because of insufficient assets to covers its obligations, an ERISA plan will have to undergo a distress termination. 29 C.F.R. § 4044.4; *In re Braniff Airways, Inc.*, 27 B.R. 222, 227 (N.D. Tex. 1982). At the very latest, the prohibition arises once plan administrators give notice of distress termination to the PBGC. 29 U.S.C. § 1341(c)(3)(D)(i)(I) and (ii)(II); 29 C.F.R. § 4041.42.

has assumed ownership over the Plan, and is prohibited by statute from making lump sum payments, Fisher cannot receive a lump sum payment as requested, but "may receive a lower annuity than provided for by the terms of the Plan if Plaintiff's annuity is in excess of PBGC limits." (A. 25a, ¶ 25).[3]

In its First Claim for Relief, the complaint alleged that defendants breached their fiduciary duties under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) in connection with the denial of the lump sum application. (A. 25a-26a, ¶¶ 26-27). The Claim asserted that plaintiff is entitled to appropriate relief therefore under § 502(a)(2). (A. 26a, ¶ 28).

The Second Claim for Relief is premised on the same allegations, and asserted that plaintiff is entitled to equitable relief under ERISA § 502(a)(3) for the alleged breaches of fiduciary duty. (A. 27a, ¶¶ 30-31).

The Third Claim alleged that in denying the lump sum application, Penn Traffic and its Board violated ERISA § 406(b)(1) and (2), 29 U.S.C. § 1106(b)(1) and (2) (prohibiting certain conflicts of interest). (A. 27a, ¶¶ 32-33). The Claim asserted that

---

[3] Plaintiff did not sue the Plan for a lump sum payment anytime in the period between the denial of his application in 2003 and the PBGC's assumption of responsibility for the Plan. (Pet. 4). Instead, he waited three years before filing the present suit against the Plan fiduciaries.

plaintiff is entitled to appropriate relief therefore under, again, §§ 502(a)(2) and (a)(3).

As relief, plaintiff sought "judgment against the defendants, jointly and severally, for the amount of his lump sum benefit" together with interest thereon. (A. 28a). Fisher also asked for declarations that defendants violated their fiduciary duty, and "declaring the amount of the lump sum benefit to which Plaintiff is entitled." (A. 28a).

II. Disposition by the Lower Courts

On October 2, 2006, defendants moved to dismiss the complaint for failure to state a claim on which relief may be granted (A. 7a), which the district court granted, (A. 16a-17a). The court ruled that neither provision under which plaintiff proceeded authorized the relief he sought. Relying on *Massachusetts Mutual Life v. Russell*, 473 U.S. 134 (1985) ("*Russell*"), *Coan v. Kaufman*, 457 F.3d 250 (2d Cir. 2006) ("*Coan*"), *Lee v. Burkhart*, 991 F.2d 1004 (2d Cir. 1993), and the plain language of the statute and its legislative history, the court held that Fisher sought relief for his own benefit and not in a representative capacity on behalf of the Plan, and he thus had failed to state a cognizable claim under ERISA § 502(a)(2). (A. 9a-13a). The court rejected plaintiff's attempt to distinguish *Russell* on the ground that it involved a claim for extracontractual damages. (A. 11a-12a).

Similarly, relying on *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993) ("*Mertens*"), *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) ("*Great-West*"), and *Coan*, the district court held that plaintiff sought compensatory damages, and he thus failed to state a cognizable claim under ERISA § 502(a)(3), which allows only for equitable relief. (A. 13a-16a). Rejecting plaintiff's argument that *Mertens* did not apply to claims against fiduciaries, the court found that the case law was "as one with respect to the case at bar, *i.e.*, Plaintiff cannot cloak a legal claim for damages in equitable clothing."[4] *Id.*

Fisher appealed the judgment. Pending his appeal, this Court handed down its decision in *LaRue v. DeWolff, Boberg and Associates, Inc.*, 128 S.Ct. 1020 (2008) ("*LaRue*"). At oral argument, the panel requested the parties brief the impact of *LaRue* on the case. In a summary order issued on April 2, 2009, the Second Circuit affirmed the district court's judgment. The court of appeals followed the district court's reasoning in rejecting Fisher's claim under ERISA § 502(a)(2), because "Fisher seeks relief for himself as an individual, rather then [sic] on behalf of all or any part of the plan." (A. 4a). Moreover, the Second Circuit held that *LaRue* did not alter this result, since the harm to the defined contribution plan at issue there affected the plan, whereas

---

[4] The court also concluded that the declaratory relief sought by plaintiff was "inherently legal." (A. 16a).

Fisher's request for a lump sum payment for himself "cannot be construed as benefitting the plan." (A. 4a). Finally, the court rejected Fisher's argument that his claim under § 502(a)(3) was equitable because it involved suit against a fiduciary and, historically, such suits were within the exclusive jurisdiction of the courts of equity, ruling that Fisher's request for money damages was not "a category of relief typically available in equity" (A. 5a), and thus not recoverable under § 502(a)(3). (A. 5a).

REASONS FOR DENYING THE WRIT

I. The Court Should Not Revisit Whether ERISA § 502(a)(2) Provides Recovery for Individual Injuries, Which Was Settled in *Russell* and Recently Reaffirmed in *LaRue*

A. *Russell* Precludes Recovery under § 409 for Individual Injuries

ERISA § 502(a)(2) authorizes suit for appropriate relief under ERISA § 409. In *Russell*, this Court unanimously held that § 409 allows recovery only for injuries to an ERISA plan, and did not authorize a personal recovery for individual injuries.

Fisher claims that the Second Circuit and other lower courts have failed to recognize that *Russell* applies only to claims for "extracontractual damages." This seriously misstates *Russell*.

Plaintiff's contentions that *Russell*'s determination that § 409 affords relief only for the benefit of a plan and not for individuals is only dicta, and that § 409 allows individual claims so long as they are for plan benefits, are wrong. Both the majority opinion and the concurrence in *Russell* were clear that *Russell*'s holding concerned *who* can sue under § 409, not what types of claims can brought under that provision. "[T]he entire text of § 409 persuades us that *Congress did not intend that section to authorize any relief except for the plan itself.*" *Id.* at 144 (emphasis added). The concurring opinion expressly agreed with this holding: "I agree with the Court's decision today that § 409 is more fairly read in context as providing 'remedies that would protect the entire plan' rather than individuals. . . ." *Id.* at 150 (Brennan, J.). The Court again made clear that its holding concerned who was protected by § 409 when, after summarizing its ruling, it specifically noted that "we do not reach any question concerning the extent to which § 409 may authorize recovery of extracontractual damages from a fiduciary *by a plan*." *Id.* at 144, n.12 (emphasis added). In other words, the defect in Russell's claim was not that extracontractual damages were unavailable under that section, but that she was seeking a personal recovery and not one for the benefit of the plan.[5]

---

[5] Plaintiff's quotation (Pet. 15-16) from *Russell* referring to a distinction between benefits and extracontractual damages (473 U.S. at 148) did not concern the scope of § 409. Rather, it is

(Continued on following page)

Further, the Court explicitly rejected the very argument that plaintiff makes here – that the "catchall" clause in § 409 authorizing "such other equitable or remedial relief as the court may deem appropriate" is independent of the remainder of the section limiting remedies to the plan alone, and thus permits individual recoveries. *See id.* at 138, 140-41; *id.* at 149-50 (Brennan, J., concurring).

Fisher concedes, as he must, that *Russell* has been "routinely cited" for the proposition that § 409 provides recovery only for claims that seek relief for injuries to the plan, regardless of whether the claim is for extracontractual damages. (Pet. 16). *See, e.g.*, *Coan v. Kaufman*, 457 F.3d 250, 262 (2d Cir. 2006) (noting that *Russell* stated that "such [409] claims may not be made for individual relief," and therefore upholding dismissal of §§ 502(a)(2)/409 claim for failure to bring suit in a representative capacity on behalf of other plan participants, "as required by section 502(a)(2)"); *Lee v. Burkhart*, 991 F.2d 1004 (2d Cir. 1993) (affirming dismissal of § 502(a)(2) claim because plaintiffs were requesting denied benefits

---

from a separate part of the opinion addressing an entirely different issue – the argument that a private right of action under ERISA for extracontractual damages should be *implied*, even if it is not expressly authorized, which the Court turned to after it completed its analysis of the claim under § 409. *Id.* at 145-48. (The Court unanimously rejected the implied-private-right-of-action argument, as well.) Nothing in the Court's analysis of this distinct issue alters the Court's holding and analysis regarding § 409.

and thus "seeking damages on their on behalf, not on behalf of the Plan"); *McDonald v. Provident Indemnity Life Ins. Co.*, 60 F.3d 234, 237-38 (5th Cir. 1995) (affirming dismissal of § 502(a)(2) claim because, while there may have been injury to the plaintiffs, there was no loss to the plan). In fact, not a single court applying *Russell* has adopted Fisher's theory that its import is restricted to claims for extracontractual damages. That theory is illogical, wrong, and contrary to the language of § 409 itself.

B. *Russell* Remains Good Law and Was Recently Reaffirmed in *LaRue*

Fisher also contends that, even if *Russell* originally precluded all claims under § 409 for individual injuries, it was implicitly overruled by *Great-West*. This contention is at odds with *Russell*, *Great-West*, and this Court's recent reaffirmance of *Russell* in *LaRue*.[6]

Quoting a clause in *Great-West* that "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration," 534 U.S. at 220 (emphasis in original) (quoting *Mertens*, 508 U.S. at 261), Fisher argues that this is a direction that ERISA is to be read "literally," which, supposedly, is in conflict with what *Russell* did, thereby

---

[6] Notably, Fisher's petition omits any mention of this Court's decision in *LaRue*.

purportedly overruling *Russell*'s specific holding on the scope of § 409. (Pet. 17-19).

In fact, neither *Great-West* nor *Mertens* concerned § 409. Both relied on *Russell*, without criticism. 534 U.S. at 209; 508 U.S. at 254. As did *Russell*, both ruled that the claims at issue were *not* cognizable under ERISA. *Russell* was *unanimous* that individual recovery was not available under § 409. As plaintiff concedes, the lower courts have repeatedly relied on *Russell* as precluding recovery by individuals. (Pet. 16). The notion that stating the general proposition that statutory text cannot be re-written by general arguments about the law's purpose operated to overrule *Russell sub silentio* is baseless.

In any event, *Russell* did not use a vague notion of "basic purpose" to "overcome the words of the text." Precisely to the contrary, what the Court in *Russell* did was to analyze the *text* of § 409. The Court concluded that the clause "such other equitable or remedial relief as the court may deem appropriate" must be read in context with the entire section:

> To read directly from the opening clause of § 409(a), which identifies the proscribed acts, to the "catchall" remedy phrase at the end – skipping over the intervening language establishing remedies benefiting, in the first instance, solely the plan – would *divorce the phrase being constructed from its context* and construct an entirely new *class* of relief available to entities other than the plan. . . . This "blue pencil" method of statutory

> interpretation . . . *impermissibly ignores the relevant context in which statutory language subsists*. . . . [T]his mode of interpretation *would render superfluous the preceding clauses* providing relief singularly to the plan, and *would slight the language following* after the phrase "such other equitable or remedial relief." . . . A fair *contextual reading* of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary.

473 U.S. at 141-42 (emphasis added). That is, "the entire *text* of § 409 persuades us that Congress did not intend that section to authorize any relief except for the plan itself." *Id.* at 144 (emphasis added).

Fisher, again, cites no case suggesting that *Russell* is no longer good law. On the contrary, cases after *Mertens* and also after *Great-West* have continued to construe § 409 as not authorizing individual relief, relying on *Russell*.[7]

---

[7] *See, e.g., Coan*, 457 F.3d at 257; *McDonald v. Provident Indemnity Life Ins. Co.*, F.3d 234, 237 (5th Cir. 1995); *Kazazian v. Bartlett & Barlett LLP*, No. 03 Civ. 7699 (LAP), 2006 WL 2563517, at *3 (Sept. 6, 2006); *Panecassio v. Unisource Worldwide, Inc.*, No. 3:01cv2065 (CFD), 2006 WL 2128647, at *9 (July 26, 2006); *Barry v. Trustees of the Int'l Assoc. of Full-Time Salaried Officers and Employees of Outside Local Unions and District Counsel's (Iron Workers) Pension Plan*, 404 F. Supp.2d

(Continued on following page)

Most critically, this Court *reaffirmed* the central holding of *Russell* less than two years ago in *LaRue*. Decided on February 20, 2008, *LaRue* resolved an ambiguity concerning the application of *Russell* to "defined contribution" plans, in which plan assets are held in the participants' individual accounts in the plan (unlike the Plan in this case, a cash balance plan that did not have individual accounts). (A. 4a). Mr. LaRue claimed that the defendant's failure to follow LaRue's instructions for the investments in his account "'depleted' his interest in the Plan" (128 S.Ct. at 1022-23), and *LaRue* considered the question of whether § 502(a)(2) authorizes a participant in a defined contribution plan to sue for misconduct that "impaired the value of *plan assets* in the participant's individual account" (*id.* at 1022 (footnote omitted) (emphasis added)).

Reviewing *Russell*, *LaRue* stated that *Russell* "stressed" that § 409(a) "characterizes the relevant fiduciary relationship as one 'with respect to *a plan*,' and repeatedly identifies *the 'plan'* as *the victim* of any fiduciary breach *and the recipient of any relief*." 128 S.Ct. at 1024 (emphasis added). *LaRue* also stated that *Russell* "concluded" that the draftsmen of § 409(a) "'were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of

---

145, 155-56 (D.C. 2005); *Communications Workers of America*, 1995 WL 590871, at *3.

an individual beneficiary.'" *Id.* at 1025 (quoting *Russell*).

Independent of *Russell*, the Court in *LaRue* also discussed the extent and reach of §§ 502(a)(2)/409, and held that they authorized only actions for the benefit of plans:

> Section 502(a)(2) provides for suits to enforce the liability-creating provisions of § 409, concerning breaches of fiduciary duties that harm *plans*.
>
> * * *
>
> [Section 502(a)(2)] authorizes the Secretary of Labor as well as plan participants, beneficiaries, and fiduciaries, to bring actions *on behalf of a plan* to recover for violations of the obligations defined in § 409(a).

128 S.Ct. at 1023, 1024 (footnote omitted) (emphasis added). And *LaRue* concluded that *"§ 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries. . . ."* 128 S.Ct. at 1026 (emphasis added).

With regard to the "protect the *entire* plan" language in *Russell*, *LaRue* explicitly confirmed that it was accurate and good law in cases such as this one, involving defined benefit plans. "[O]ur references to the 'entire plan' in *Russell* . . . accurately reflect the operation of § 409 in the defined benefit context. . . ." 128 S.Ct. at 1025. In short, *LaRue* confirmed what *Russell* had already established: that § 409 authorizes only claims for the benefit of the plan and its

assets. *LaRue* reaffirms *Russell*'s essential analysis, and expressly reaffirms *Russell*'s "entire plan" language in the context of defined benefit plans.

C. *Russell* and *LaRue* Were Correctly Decided; Overturning Them Would Undermine the Vital Role of *Stare Decisis*

In the alternative, Fisher claims that *Russell* must be overruled because its method of statutory construction ignored ERISA's remedial purpose, which caused it to link the "catchall" provision of § 409 to the remainder of the paragraph limiting remedies to the plan alone. (Pet. 20). This argument – which would require that the Court also overrule *LaRue* – is meritless.

As noted above, the Court in *Russell* anchored its analysis firmly in the *text* of § 409. The Court did not identify an ambiguity or vagueness in its plain meaning that could be resolved only by recourse to general statutory purpose. On the contrary, the Court's holding was based on a reading of statutory language and surrounding provisions. *Russell*, 473 U.S. at 144.

Although Fisher disputes *Russell*'s reading of § 409 because it ignored the placement of a comma before the "catchall phrase," which, in his view, operates to sever that phrase from the rest of the sentence (Pet. 23-37), the Court considered an interpretation of the statute along these lines and

rightly rejected it. The Court noted that such a reading would "divorce the phrase being construed from its context and construct an entirely new class of relief available to other entities than the plan." 473 U.S. at 141-42. Specifically, it would "render superfluous the preceding clauses providing relief singularly to the plan, and would slight the language following after the phrase 'such other equitable or remedial relief.'" This language, authorizing the removal of a fiduciary, is another instance of the kind of "plan-related relief" provided for by the preceding clauses. *Id.* at 142. In short, *Russell*'s interpretation of § 409 is true to its meaning.

But even with respect to statutory purposes, the decisions in *Russell* and *LaRue* limiting relief to the plan are faithful to the congressional intent manifested in ERISA's carefully balanced remedial scheme. Without denying ERISA's primary goal of "benefitting employees," *Mertens*, 508 U.S. at 262-63, this Court has always recognized the complex balance Congress struck in passing ERISA. *Pilot Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) ("[T]he detailed provisions of [ERISA] 502(a) set forth a *comprehensive civil enforcement* scheme that represents *a careful balancing* of the need for prompt and fair claims settlement procedures *against the public interest in encouraging the formation of employee benefit plans.*") (emphasis added); *Mertens*, 508 U.S. at 262 (describing ERISA as "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests – not

all in favor of potential plaintiffs."); *id.* at 263 (acknowledging a tension between "the primary ERISA goal of benefitting employees and the subsidiary goal of containing pension costs"). The goal of cost containment was expressly noted by the majority in *Russell*, 473 U.S. at 148 n.17 ("Congress was concerned lest the cost of federal standards discourage the growth of private pension plans.") (citing legislative history).

Thus, Congress made various "policy choices" reflected "in the inclusion of certain remedies and the exclusions of others[.]" *Pilot Ins. Co.*, 481 U.S. at 54. This Court has resisted recalibrating the balances in ERISA and changing the choices Congress has made. "We will not attempt to adjust the balance between those competing goals [of benefiting employees and containing pension costs] that the text adopted by Congress has struck." *Mertens*, 508 U.S. at 2563.

Given the compromise nature of ERISA, it certainly would have been rational for Congress to have concluded that imposing on fiduciaries personal liability to beneficiaries for injuries that did not harm the plan would deter plan formation and service as fiduciaries of qualified individuals or institutions. In reaching a result protective of these interests, *Russell* and *LaRue* were sensitive to ERISA's purposes; to have held otherwise would have been to substitute a different policy balance for the one reached by Congress.

In sum, *Russell* and *LaRue* were correctly decided and need not be revisited.

Yet even if this Court would come to a different conclusion were it approaching the issue for the first time, it is not. Fisher offers no justification for a radical and disruptive break with the settled precedent represented by *Russell*, relied on for twenty-five years, and reaffirmed less than two years ago in *LaRue*. And as this Court has stated, *stare decisis* has its greatest force when interpreting federal statutes. *LaRue*, 128 S.Ct. at 1028 ("in matters of statutory interpretation . . . principles of *stare decisis* have their greatest effect") (Roberts, C.J., concurring); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) ("[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [this Court] ha[s] done."). Thus, if Congress disagreed with this Court's interpretation of § 409, it was – and is – free to amend the statute. That in 25 years Congress has not done so should make this Court even more reluctant to reconsider these rulings. To overturn *Russell* now would usurp the role of Congress, inject uncertainty into the ERISA remedial scheme, and upset the settled expectations created by *Russell*, *LaRue*, and their progeny, which *stare decisis* aims to protect.

II. The Court Should Not Disturb the Well-Settled Rule that "Equitable Relief" Under ERISA § 502(a)(3) Does Not Include Compensatory Damages

A. *Mertens* and *Great-West* Preclude Recovery Under § 502(a)(3) for Compensatory Damages

This Court established in *Mertens*, and reaffirmed in *Great-West*, that compensatory damages are not "equitable relief" within the meaning of § 502(a)(3). Fisher nevertheless argues that lower courts have uniformly misapplied this Court's decisions in *Mertens* and *Great-West* to suits against fiduciaries. (Pet. 30-34). Plaintiff offers no convincing reason why money damages should turn into equitable relief when the defendant is a fiduciary. To do so would disregard the reasoning of *Mertens* and *Great-West* and contravene virtually every lower court to have considered the issue.

Section 502(a)(3) authorizes only "equitable relief." However, plaintiff seeks a money judgment. A money judgment is, of course, the quintessential form of legal relief. Fisher argues that his request for a money judgment nonetheless seeks equitable relief. *Mertens* and *Great-West* preclude this contention.

The central holding of *Mertens* was that "equitable relief" under § 502(a)(3) means the "categories" of relief that were "typically available in equity." This includes "injunction, mandamus, and restitution," but "*not* compensatory damages." 508 U.S. at 256

(emphasis added). *Great-West* reaffirmed this holding of *Mertens*. 534 U.S. at 210; *see also id.* at 215 ("all the Supreme Court meant in *Mertens* and other cases was that restitution, in contrast to damages, is a remedy commonly ordered in equity cases and therefore an equitable remedy in a sense in which damages, though *occasionally* awarded in equity cases, are not") (quoting *Reich v. Continental Casualty Co.*, 33 F.3d 754, 756 (7th Cir. 1994)); *id.* at 234 (describing *Mertens*' definition of equitable relief as "categories of relief *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages" as the "core holding of *Mertens*") (Ginsberg, J., dissenting).

Fisher contends that his damage claim is nevertheless equitable relief because it is asserted against fiduciaries and thus would have been within the exclusive jurisdiction of an equity court. This argument is, again, without any merit.

In *Mertens*, the petitioners, participants in a pension plan, brought suit against the plan's actuary for knowing participation in a fiduciary's breach based on failing to fund the plan adequately. This led the PBGC to terminate the plan and, in turn, resulted in the petitioners receiving "only the benefits guaranteed by ERISA . . . which are in general substantially lower than the fully vested pensions due them under the plan." 508 U.S. at 250. The petitioners sought monetary relief (*id.*), arguing that requiring the respondent "to make the . . . plan whole" for the losses it caused "would constitute

'other appropriate equitable relief' within the meaning of § 502(a)(3)." *Id.* at 253.

The Court rejected this claim, noting that petitioners "do not seek a remedy traditionally viewed as 'equitable,' such as injunction or restitution." Rather, they were seeking "nothing other than compensatory *damages* – monetary relief. . . ." *Id.* at 255 (emphasis in original). "Money damages are, of course, the classic form of *legal* relief." *Id.* (emphasis in original).

Petitioners in *Mertens*, like Fisher here (Pet. 30-34), argued that "this reading of 'equitable relief' fails to acknowledge ERISA's roots in the common law of trusts," in that "a beneficiary's action to recover losses resulting from a breach of duty . . . traditionally has been obtained in courts of equity and therefore is, by definition, 'equitable relief.'" *Id.* at 256 (citation omitted). The Court acknowledged this:

> It is true that, at common law, the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust. . . . It is also true that money damages were available in those courts against the trustee . . . and against third persons who knowingly participated in the trustee's breach.

Id. at 256 (citations and footnote omitted). The Court further recognized that "[t]he term 'equitable relief' can assuredly mean . . . whatever relief a court of equity is empowered to provide in the particular case at issue." *Id.* "But . . . 'equitable relief' can also refer

to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.* (emphasis in original). However, "[i]n the context of the present statute, we think there can be no doubt." *Id.* at 257. The Court rejected the first reading, and held that money damages are not available under § 502(a)(3). *Id.* at 256-59; *see also id.* at 263, 268-69; *id.* at 273 (White, J., dissenting) (under majority opinion's interpretation, § 502(a)(3) relief excludes "compensatory damages," "money damages," "compensatory monetary awards," or "*suit for damages against a fiduciary* . . . [or] a participating non-fiduciary") (emphasis added).

In holding that under § 502(a)(3) equitable relief means the kinds of relief typically available in equity, which did not include compensatory damages, *Mertens* repudiated the idea, advanced by Fisher here, that the meaning of equitable relief should be determined by the defendant's status or the intricacies of equity court jurisdiction.

Great-West reaffirmed *Mertens*' core holding and analysis of what constitutes equitable relief. Responding to an argument similar to that made by Plaintiff – that "the common law of trusts provides petitioners with equitable remedies that allowed them to bring this action under § 502(a)(3)," *id.* at 219 – this Court again rejected construing § 502(a)(3) through the lens of equity court jurisdiction concerning trusts:

> These **trust remedies are simply inapposite**. In *Mertens*, we **rejected** the claim **that the special equity-court powers applicable to trusts define the reach of § 502(a)(3)**. Instead, we held that the term "equitable relief" in § 502(a)(3) must refer to "those categories of relief that were *typically* available in equity . . . "

Id. at 219 (italicized emphasis in original, bold emphasis added). Under both *Mertens* and *Great-West*, the historical peculiarities of equity courts' exclusive jurisdiction over suits against trustees cannot transform the legal relief sought by Fisher here – money damages – into equitable relief.

B. Overruling *Mertens*, *Great-West*, and Related Lower Court Decisions Would Equally Offend *Stare Decisis* Principles

Every Circuit to consider the issue has held that § 502(a)(3) does not authorize recovery of compensatory damages.

> *First Circuit*: *Armstrong v. Jefferson Smurfit Corp.*, 30 F.3d 11, 13 (1st Cir. 1994) ("the status of the defendant (i.e., fiduciary or nonfiduciary) does not affect the question of whether compensatory legal damages constitute 'appropriate equitable relief' under the statute. *This* is the question answered, in the negative, by the *Mertens* Court.").
>
> *Second Circuit*: *Coan v. Kaufman*, 457 F.3d 250, 262 (2d Cir. 2006) (claim for make-whole

monetary relief against an ERISA fiduciary was not "equitable relief" under § 502(a)(3)).

Third Circuit: *D'Amico v. CBS Corp.*, 297 F.3d 287, 289, 292 n.5 (3d Cir. 2002) ("Because plaintiffs have chosen to proceed under 29 U.S.C. § 1132(a)(3), their fiduciary duty claims are limited to equitable relief [citing *Great-West*]. . . . Thus, even if we held that plaintiffs were not required to exhaust their remedies, they would not be able to recover damages for any of their un-exhausted claims.").

Fourth Circuit: *LaRue v. DeWolff, Boberg & Assoc., Inc.*, 450 F.3d 570, 577, *rev'd on other grounds*, 128 S.Ct. 1020 (2008) (under *Mertens* "the relevant question is . . . whether a given type of relief was available in equity courts *as a general rule*"; equally, "the fact that plaintiff happens to be a participant or fiduciary is entirely beside the point in the §1132(a)(3) analysis") (original emphasis); *Rego v. Westvaco Corp.*, 319 F.3d 140 (4th Cir. 2003).

Sixth Circuit: *Crosby v. Bowater Inc. Retirement Plan for Salaried Employees of Great Northern Paper Inc.*, 382 F.3d 587, 596 (6th Cir. 2004) ("If it be argued that Mr. Crosby's position should be likened to that of a beneficiary of a trust, who could invoke the jurisdiction of an equity court to enforce a right to receive money from the trust, the short answer is that just such an argument has been explicitly rejected by the United

States Supreme Court."); *Helfrich v. PNC Bank, Kentucky, Inc.*, 267 F.3d 477, 482 (6th Cir. 2001) ("ERISA does not permit plan beneficiaries to claim money damages from plan fiduciaries.").

Seventh Circuit: *Brosted v. Unum Life Ins. Co. of Am.*, 421 F.3d 459, 466 (7th Cir. 2005) (noting that a claimant "clearly cannot recover compensatory damages under section 502(a)(3)"; deciding case on other grounds).

Eighth Circuit: *Halbach v. Great-West Life & Annuity Ins. Co.*, 561 (F.3d 872, 882-3 (8th Cir. 2009); *Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593, 598 (8th Cir. 2005).

Ninth Circuit: *Farr v. U.S. West Communications*, 151 F.3d 908, 916 (9th Cir. 1998); *McLeod v. Oregon Lithoprint Inc.*, 102 F.3d 376, 378 (9th Cir. 1996).

Tenth Circuit: *Callery v. U.S. Life Ins. Co. in the City of New York*, 392 F.3d 401, 404 (10th Cir. 2004).

The *stare decisis* considerations that apply to this Court's § 409 jurisprudence apply with equal force to its § 502(a)(3) precedents, and should prevail against a grant of certiorari. The lower courts' reliance on *Mertens* and *Great-West* is evident from the above cases. If Congress intended a different result than *Mertens* and *Great-West*, it could have amended and still could amend § 502(a)(3) to permit recovery of compensatory damages. That it has not done so

argues heavily against breaking with this well-established authority.

III. The Peculiar Facts of This Case Would Provide a Poor Vehicle for the Court's Review

Although Fisher points to a perceived injustice caused by *Russell*, *Great-West* and *Mertens*, the peculiarities of his case make it a poor tool to accomplish the revisions to ERISA's remedial scheme that he champions.

First, Fisher's argument is premised on the supposed unavailability of relief for the denial of his lump sum payment, but that is largely a product of his own making. The logical target of a suit for denial of a plan benefit is the Plan itself, and the proper vehicle is ERISA § 502(a)(1)(B). Fisher flatly states that "[i]f the Plan herein had not been terminated, Petitioner would have sued under ERISA § 502(a)(1)(B) for benefits due to him under the terms of the plan," but because "the Plan has been terminated, and because all state laws are preempted," he may only recover under §§ 502(a)(2) or 502(a)(3). (Pet. 15, n.5). But his belief that the termination of the Plan prevented a suit for benefits under § 502(a)(1)(B) is only speculative; it is not clear that a court cannot award judgment against a plan in a state of termination but before the plan's assets have been transferred to the PBGC and the plan has been dissolved.

Moreover, whether Fisher would have been able to recover against the Plan under § 502(a)(1)(B) is unknown because he chose not to bring such a claim. Had he pursued recovery against the Plan, he could have argued that the ban on lump sum payments initiated by a distress termination did not affect his application for such a payment, because he applied for a lump sum payment before the prohibition arose and his claim should be evaluated in light of the circumstances at the time of his application. The Plan would have disputed Fisher's contention, but the issue could have been litigated and determined. Because he chose not to sue the Plan, the result is unknown, and it is far from clear that the issuance of a notice of distress termination after he submitted his application made it impossible for Fisher to press a claim on his application.

Second, in the end, Fisher's inability to obtain a lump sum payment in lieu of an annuity is a direct result of the federal pension law policy that disfavors lump sum payments from a distressed plan.

As alleged in the complaint, at the time Fisher applied for a lump sum distribution (August 15, 2003), the Plan was underfunded, and Penn Traffic had been advised that there might have to be a distress termination of the Plan. (A. 23a, 24a, ¶¶ 10, 20). Penn Traffic was already in bankruptcy, and the Plan was underfunded by 60 percent. *See* p. 1, n.1, above. As also alleged in the complaint, on September 29, 2003, the Board adopted a resolution to terminate

the Plan. (A. 25a, ¶ 22). In such circumstances, ERISA disapproves of lump sum distributions.

As noted above (p. 2, n.2), the PBGC is prohibited from paying lump sum benefits once it has assumed trusteeship over the plan. 29 C.F.R. § 4022.7(a). As a measure of its critical role in preserving assets when a plan is *in extremis*, this prohibition reaches back in time before the PBGC's assumption of trusteeship, forbidding lump sum payments *both* from the time a notice of distress termination is given to the PBGC, 29 U.S.C. § 1341(c)(3)(D)(i)(I) and (ii)(II); 29 C.F.R. § 4041.42; *and*, even earlier, from the time it is *anticipated* that a plan has insufficient assets and will have to terminate, 29 C.F.R. § 4044.4; *In re Braniff Airways, Inc.*, 27 B.R. at 227 ("The purpose of the Regulation [the version of § 4044.4 then in effect, identical in all relevant respects] is to maintain the respective positions of the participants in a plan's assets and prevent a run on the bank").[8]

Had these ERISA prohibitions not existed, Fisher would have been able to compel a lump sum pension payment, either from the Plan or from the PBGC. Thus, nothing in federal policy supports re-writing ERISA's provisions as construed by this Court because Fisher did not receive a lump sum benefit payment. Indeed, ERISA envisions just what occurred

---

[8] Additionally, the plan trustee may recoup lump sum payments made within the 3 years prior to termination which fall within the recoverable amount pursuant to 29 U.S.C. § 1345.

here – that in the case of a distress termination, plan beneficiaries receive an annuity as determined by PBGC guidelines.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

COOLEY GODWARD KRONISH LLP

WILLIAM H. O'BRIEN
LORI PLOEGER
JEFFREY W. LANG

1114 Avenue of the Americas
New York, New York 10036
(212) 479-6000
Attorneys for Respondents